ISSUED OCTOBER 2, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

4805 CONVOY, INC. dba Dream Girls 4805 Convoy Street San Diego, CA 92111, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6988 File: 47-203381 Reg: 97039813 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: August 12, 1998 Los Angeles, CA

4805 Convoy, Inc., doing business as Dream Girls (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 35 days, with 10 days thereof stayed for a probationary period of one year, for its employee having sold an alcoholic beverage (beer) to a minor, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

[1]The decision of the Department, dated November 20, 1997, is set forth in the appendix.

Appearances on appeal include appellant 4805 Convoy, Inc., appearing through its counsel, William R. Winship, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on October 16, 1987. Thereafter, the Department instituted an accusation against appellant charging that appellant, through its employee, Cari Cooper, sold an alcoholic beverage (beer) to Joshua Morris, a minor who was then 19 years of age.[2]

An administrative hearing was held on August 29, 1997, at which time the parties stipulated that the offense had occurred as alleged in the accusation and that appellant's prior disciplinary history as alleged in the accusation was also correct. Appellant then presented the testimony of three witnesses in support of mitigation.

At the close of the evidence, the Department recommended a suspension of 45 days, with no part stayed, arguing that a suspension of that length was appropriate in light of appellant's prior disciplinary history, even though none of the prior proceedings had involved a sale to a minor. Appellant urged the Administrative Law Judge (ALJ) to treat the matter as a first violation, since none of the other disciplinary matters involved a sale to a minor. Appellant stressed its training programs and preventive measures it has adopted in its efforts to stay within the law while catering to more than 600,000 patrons in its eleven years of operation offering adult entertainment. Appellant blamed the incident in question

[2] Appellant's brief asserts that Morris was a decoy.

on the fact that the person who was responsible for checking identification of patrons when they entered had received word before going to work that day that she faced breast removal surgery because of cancer, and her emotionally-distressed state distracted her such as to permit the minor to slip past her.[3] Appellant also challenged the Department's reliance upon the prior disciplines, the three most recent of which involved Rule 143 violations, arguing that none involved a sale to a minor, some involved matters of little import, some occurred because of matters beyond appellant's control, and others were from eight to ten years old.

Following the conclusion of the hearing, the ALJ imposed a 35-day suspension, staying ten days. In his proposed decision, he stated that the testimony of appellant's president and its door person were considered mitigating factors, and that, although appellant's prior disciplinary history did not involve any sales to minors, it would still be considered in determining the appropriate penalty. The ALJ did not indicate the particular weight placed on either of these considerations, other than simply to recite that they would be considered. The net 25-day suspension was less than appellant's until then most recent suspension of 45 days, with 15 days stayed, for a 1995 Rule 143 violation.[4]

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[3] Because the parties stipulated to the fact that the violation had occurred, the record does not contain any information as to the precise circumstances concerning the manner in which the minor gained entry into the premises and purchased an alcoholic beverage. Without criticism intended, it would have been of some assistance to the Board in knowing this, in light of the emphasis placed on the door person's emotional state as a factor in mitigation.

[4] Department counsel stated that it was likely the Department would reimpose the stayed 15 days, since the current violation occurred within the period of the stay. Appellant's counsel urged the ALJ to rule in a manner that precluded the Department from doing so. However, there is nothing in the ALJ's proposed

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises only the issue that, in light of all the circumstances, the penalty is excessive.

DISCUSSION

Appellant contends that the 35-day suspension, even with 10 days stayed, is excessive, especially so in light of the Department's stated intention to reimpose 15 days of a 1995 suspension for a Rule 143 violation.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].).

Appellant cites seven mitigating factors: its operation of a large restaurant catering to over 600,000 patrons in an eleven-year period; its regular and aggressive training of its employees in the rules of the Department; its continuous exposure to vice investigations by the San Diego Police Department; its use of a "hospitality consultant" to conduct more than 60 undercover inspections to ensure compliance with Department rules and regulations; the absence of any prior sale-to-minor violation; and, finally, the mental lapse of a trained and supervised employee who earlier that day had learned she faced cancer and breast removal surgery. Appellant also stresses the economic hardship that will result from a 40-day suspension (25 days of the current penalty and 15 days of the

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decision that bears on the point.

previously stayed penalty), which, appellant asserts, will put 140 employees out of work for that nearly six-week period.

The Department contends that the ALJ properly considered both mitigating and aggravating factors in arriving at the penalty, and that in doing so, he acted within the discretion accorded him. The Department argues that appellant simply disagrees with the ALJ and the Department with respect to what would be a reasonable penalty.

Appellant's argument that the penalty is excessive in light of the fact that this is its first sale-to-minor violation in its eleven years of operation, that the violation occurred as a result of an understandable mental lapse on the part of an otherwise well-trained employee, and that, as a consequence, a combined 40-day closure will adversely affect a large number of appellant's employees, has a certain emotional appeal. The most persuasive argument appellant makes is that this is its first sale to minor violation since it was issued its license.

Thus, the question is whether, and to what extent, appellant's prior disciplinary history ought to bear on the penalty, when the violation in question is appellant's first sale-to-minor violation in its eleven years of operation. Only if it can be said that the Department was precluded by law from considering appellant's prior discipline could it be said to have abused its discretion. Appellant has not cited any cases so holding, and this Board is unaware of any. The Department states very candidly that its practice is to take such violations into account, but stresses the fact that in this case the violation took place in the context of an establishment specializing in adult entertainment.

The case law gives the Department a great deal of discretion in this area:

See Martin v. Alcoholic Beverage Control Appeals Board (1959) 52 Cal.2d 287 [341 P.2d 296, 300]. However, this discretion must be exercised in a reasonable manner, and not arbitrarily. And, despite the Department's utilization of general guidelines and standard penalties, the ultimate determination of an appropriate penalty involves more than simply adding or subtracting numbers. Where there are factors of aggravation and mitigation, the Department's expertise becomes a significant ingredient in the resulting equation.

This appears to be one of those cases where the penalty can have a significant impact on a licensee, yet not be so extreme that it can be said to constitute an abuse of discretion.

While there may be cases where it is inappropriate for the Department to consider dissimilar prior violations as a basis for penalty enhancement, this does not seem to be such a case. There could be said to be a relationship between the sale-to-minor offense and the prior Rule 143 violations, in that not only was a minor allowed to buy an alcoholic beverage, he did so in an establishment specializing in adult entertainment. And, although the record does not disclose how the minor purchased the alcoholic beverage, we may safely assume it was not from the door person. If appellant had a backup system, and there is no record evidence that it did, the backup system also failed.

Appellant asked the ALJ, and invites this Board, should it elect to affirm the Department, at least to rule in a manner that precludes the Department from reimposing the stayed portion of an earlier penalty. We must decline the invitation. It would have been premature for the ALJ to address the issue, and it would also be premature for this Appeals Board to do so. The question, at this date, remains

hypothetical.

We acknowledge the difficult and unfortunate facts which underlie this appeal. However, as compelling as they are, they do not permit us to abdicate our responsibility to apply the law as we understand it. Given the undisputed existence of the violation, and the context and structure in which it occurred, we cannot say that the decision of the Department is an abuse of discretion.

CONCLUSION

The decision of the Department is affirmed.[5]

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.